



Comptroller General
of the United States

Washington, D.C. 20548

147011

Decision

Matter of: Service & Sales Inc.

File: B-247673

Date: June 29, 1992

Guy Stepanski for the protester.
Milton D. Watkins, Esq., Department of the Air Force, for the agency.
Sylvia Schatz, Esq., M. Penny Ahearn, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in preparation of the decision.

DIGEST

Protester's alternate product was properly rejected as technically unacceptable, where protester's technical data package submitted for source approval contained drawings marked proprietary to original equipment manufacturer, but provided no proof of ownership or license to use drawings, and protester failed to provide this evidence after being notified of the deficiency.

DECISION

Service & Sales Inc. (SSI) protests any award under request for quotations (RFQ) No. F34601-92-20447, issued by the Department of the Air Force, Tinker Air Force Base, Oklahoma, for quantities of a seal assembly used on jet engines for the C-141, F-111, and E-3 aircraft. The protester primarily argues that the agency's determination that the firm does not qualify as an approved source, which resulted in rejection of the firm's quote, lacked a reasonable basis.

We deny the protest.

The seal assembly is designated a safety critical item because a breakdown could cause debris to be pulled into the engine, causing extensive damage. The RFQ was issued on a sole-source basis pursuant to the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(1) (1988), naming Allied-Signal Aerospace Company, Garrett Fluid Systems Division (Allied-Signal/Garrett), the original equipment manufacturer (OEM), as the only known source of supply for the part, which was identified in the RFQ by national stock number (NSN) and part number. The RFQ also permitted expressions of interest from other firms, but warned that the agency

lacked an adequate data package for the part and that quotes from firms not previously identified as sources would be considered only if it could be determined prior to award, on the basis of data supplied by the firm, that the proposed part would meet the agency's requirements. In this regard, the RFQ advised that such quotes would be considered if the firm provided (1) the source of the data to be used in performance of the contract, including the drawing number, revision letter, and the date of the last revision; (2) manufacturing data to be used in production of the part; and (3) evidence that the part will meet the agency's requirements, such as identification of previous production of the part or preproduction samples of the part.

Two firms, Allied-Signal/Garrett and SSI, submitted quotes by the closing date. SSI offered its own alternate seal assembly. SSI had previously requested source approval for the part on several occasions, beginning in 1989. The agency disapproved these prior requests on the basis of incomplete data submissions, including failure to submit necessary technical specifications, drawings, and revisions. The agency also notified the firm, after its initial attempt to gain qualification, that in order to qualify its alternate part on the basis of the OEM's drawings, it would need to provide evidence of a contractual or licensing agreement with the proprietary drawing designer. Although SSI then submitted a new technical data package for source approval of its alternate part, consisting of drawings marked proprietary to the Garrett Corporation (a predecessor of Allied-Signal/Garrett), it provided no proof of ownership of the license to use the Garrett drawings. The Air Force denied SSI's request for source approval with respect to this procurement on the basis that SSI's latest technical data package failed to include the most recent revisions to the Allied-Signal/Garrett drawings. SSI thereupon filed this protest with our Office, challenging this denial. (Subsequently, the agency rejected the firm's quote as technically unacceptable.)

SSI primarily argues that the agency has unreasonably denied approval of the firm's alternate part based on immaterial drawing revisions not necessary to determine the acceptability of the alternate part. In this regard, the protester argues that when a revision to a part is significant, i.e., affecting the form, fit, or function of the part, the part must be assigned a new NSN. Since no NSN has been assigned to the part, SSI contends that the revisions necessarily must have had no affect on form, fit, or function and therefore were not significant or material.

The Air Force responds that it properly rejected SSI's source approval request based on the protester's failure to submit the latest Allied-Signal/Garrett drawing revisions,

which it contends were necessary to evaluate the acceptability of SSI's proposed part. The agency reports that it lacked access to the latest drawing revisions, due to their proprietary nature, and maintains that therefore it was impossible to determine the significance of the revisions. The Air Force speculates that the revisions could have affected the safety, reliability, or service life of the item.

When a contracting agency restricts a contract award to an approved source, it must give nonapproved sources a reasonable opportunity to qualify. 10 U.S.C. § 2319(c); Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2; Nordam, B-230655, May 16, 1988, 88-1 CPD ¶ 462. However, the obligation to demonstrate the acceptability of an alternate product is on the offeror. Sterling Mach. Co., Inc., B-246467, Mar. 2, 1992, 92-1 CPD ¶ 253. The procuring agency is responsible for evaluating the data supplied by an offeror and ascertaining if it provides sufficient information to determine the acceptability of a product. We will not disturb the agency's technical determination in this regard unless it is unreasonable. East West Research, Inc., B-244437, Aug. 27, 1991, 91-2 CPD ¶ 207; Peck Equip. Co., B-227135, July 13, 1987, 87-2 CPD ¶ 40. Even where information may be difficult to obtain due to its proprietary nature, an agency may properly determine that an alternate product offer does not establish the acceptability of the alternate without that information, so long as it is reasonably necessary for a thorough evaluation. Alpha Tech. Servs., Inc., B-243346, July 23, 1991, 91-2 CPD ¶ 85.

Here, the Air Force justifies rejection of SSI's alternate product on the basis that SSI failed to submit the latest drawing revisions. The agency, however, has not explained why the revisions are needed in the evaluation, other than that it believes that the revisions could be material. While we agree with the agency that the fact that no new NSN was assigned to the part as a result of the revisions is not dispositive to the materiality of the revisions, we also do not find that the agency's mere speculation as to the materiality of the revisions dispositive.¹ Consequently,

¹Contrary to the protester's suggestion, in this regard, we find no requirement for the assignment of a new NSN, as the result of revisions made by OEMs to their own parts in the military specification cited by the protester, MIL-STD-100E, "Engineering Drawing Practices." The cited specification simply provides requirements for the preparation of engineering drawings by or for the Department of Defense. See Alpha Tech. Servs., Inc., supra.

it remains unclear whether there are any substantive differences between the drawings in the protester's submission and the revisions.

Although an agency has a legitimate interest in ensuring the functional integrity of a critical application item by requiring compliance with current design revisions, it would be improper to deny source approval for failure to provide a revision to the OEM drawing based on a nonmaterial drawing revision, such as, for example, a revision which adds sources and applications that do not affect item functionality. See Kitco, Inc., B-241868, Mar. 1, 1991, 91-1 CPD ¶ 238. Further, in view of the obligation under 10 U.S.C. § 2319 to furnish nonapproved sources a reasonable opportunity to compete, we believe that where proprietary revisions themselves are unavailable, the agency should make inquiry to the OEM (Allied-Signal/Garrett), as to the nature of the revisions, in order to determine their materiality and whether they are necessary for evaluation of the acceptability of the proposed alternate part. (See, for example, Alpha Tech. Servs., Inc., supra, where the procuring agency based its belief that a certain numerical drawing revision was substantial on the OEM's representation that numerical revisions were major revisions.)²

Nevertheless, we find that the Air Force properly rejected SSI's offer. SSI's data package relied on drawings marked proprietary to an Allied-Signal/Garrett predecessor company, but SSI provided no proof of ownership or license to use the drawings. As we have previously recognized, the failure of an offeror of an alternate product to establish its right to use proprietary drawings of another firm supports the rejection of an approval request that is based upon the drawings. See Cytec Corp., B-231786, Sept. 28, 1988, 88-2 CPD ¶ 294. Here, the record indicates that SSI was notified in 1989, following its initial attempt to qualify its alternate part, that its part would not be approved until SSI provided sufficient information for evaluation, including "clear and convincing evidence that the requestor is aware of the latest configuration and has some contractual or license agreement with the proprietary [drawing] designer. . . ."

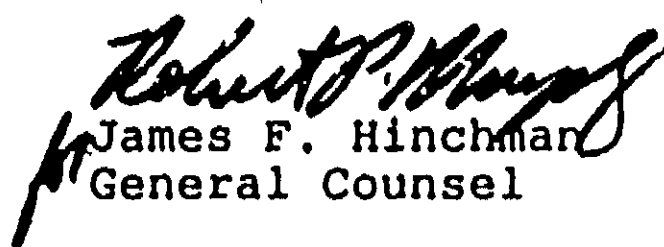
Although SSI also argues that the agency has delayed processing the firm's source approval requests until the technical data becomes outdated, it appears from the record that

²We find no merit to SSI's additional argument that its source approval request was unreasonably denied based on revisions which were not required by the RFQ. We believe the part number reference in the RFQ was sufficient to indicate that the agency required the most current design. Alpha Tech. Servs., Inc., supra.

the Air Force afforded SSI four opportunities over a span of 4 years to demonstrate the acceptability of its alternate part, and promptly notified SSI each time of the informational deficiencies in the firm's technical data packages. The record further indicates that SSI's first two alternate source requests were disapproved not only for failure to provide the latest drawing revisions, but also for failure to provide all otherwise necessary drawings and technical specifications. In any event, as discussed above, SSI's part could not be qualified as an alternate source without evidence of a contractual or licensing agreement with the proprietary owner of the drawings in the firm's technical data package; again, although notified of this deficiency in its package, SSI never provided such evidence. Under the circumstances, we find that the Air Force, having afforded SSI a reasonable opportunity to qualify its part, reasonably determined that SSI had not established the acceptability of the part.

While we are concerned with the difficulties which a firm like SSI faces in attempting to obtain source approval for its product, we also recognize the agency's legitimate interest in ensuring the functional integrity of a critical application item. Under the circumstances here, it appears that reverse engineering of the part (and the resulting development by the firm of its own drawings) may provide the most reasonable method for SSI to obtain source approval and thereby become eligible to compete. We therefore recommend that the Air Force arrange for SSI to have an opportunity to examine one of Allied-Signal/Garrett's parts under the agency's bailment or borrowing program in order to facilitate the reverse engineering of the part. See Alpha Tech. Servs., Inc., supra.

The protest is denied.


James F. Hinchman
General Counsel